114-619

# TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. 266.

THE UNITED STATES, APPELLANT,

vs.

RICHARD R. CORSON.

APPEAL FROM THE COURT OF CLAIMS.

**FILED SEPTEMBER 15, 1882.**

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1 In the Court of Claims. December term, 1870.

I.—*Petition.*—*Filed Oct'r 6, 1871.*

RICHARD R. CORSON
*vs.*
THE UNITED STATES. } No. 6387.

To the honorable Judges of the Court of Claims:

Your petitioner, Richard R. Corson, respectfully represents:

That he is a resident of the town of Norristown, State of Pennsylvania; is and ever has been a loyal citizen of the United States, and has never aided or abetted the late rebellion.

That on the 12th of May, 1861, he was commissioned an assistant quartermaster, with the rank of captain, in the volunteer army of the United States, at which time he entered upon the discharge of his duties as such officer, and continued to discharge said duties until the 27th of March, 1865, when he was summarily dismissed the service by order of the President of the United States. See annexed exhibit, marked A.

That said order was issued without just cause. That by reason of said order of dismissal he was compelled to and did remain out of service until the 9th of June, 1865, when said order of dismissal was revoked by the President of the United States, and petitioner was restored to his former rank and position in the Army. See annexed exhibit, marked B.

2 That during the time he was out of service as aforesaid he was ready and willing to perform the duties of his office, and was endeavoring to procure the revokal of said order of dismissal; that your petitioner continued thereafter in service until the 7th of October, 1865, when he was honorably mustered out. See attached exhibit, marked C.

That by the terms of said order of muster-out (see Exhibit C) he was required to satisfy the Pay Department that he was not indebted to the United States before he could receive the amount due him, and after having obtained certificates of non-indebtedness from the Government, made demand for his final pay to the Pay Department, and was refused payment of all pay and allowances from March 27, 1865, to June 9, 1865, as also for the three months pay proper, allowed by sec. 4 of the act of Congress, approved March 3, 1865 (13 Stat. L., p. 497), to officers who were in commission March 3, 1865, as also allowed by the act of July 13, 1866 (14 Stat. L., p. 94), to those in service March 3, 1865, who were honorably discharged after April 9, 1865.

Whereupon your petitioner, by virtue of the statutes in such cases made and provided, presents this his petition, and by reason of the premises prays judgment for pay and allowances from March 27, 1865, to June 9, 1865.

| | |
|---|---|
| 2 month' and 13 days..... | 327 99 |
| 3 months' pay proper, as aforesaid..... | 210 |
| Making the sum of..... | 537 99 |

And for such relief as the honorable court may see fit to grant. And he will ever pray, &c.

RICHARD R. CORSON,
By his attorney, LEWIS S. WELLS.

The above figures corrected & sworn to before me.

EDM. F. BROWN,
*Notary Public.*

3 DISTRICT OF COLUMBIA,
*Washington City, ss:*

Lewis S. Wells, of said city, being duly sworn, deposes and says that he is attorney for the claimant in the foregoing petition; that he is informed, and from such information believes same to be true, as also the exhibits marked A, B, and C, that no transfers or assignment of the claim in the said petition set forth, nor any interest therein, or any part thereof, has been made to any person whomsoever; that the said claimant is justly entitled to the amount in the said petition claimed from the United States, after allowing and deducting all just credits and set-offs.

LEWIS S. WELLS.

Sworn and subscribed to before me the 2d day of October, A. D. 1871.
[SEAL.] EDM. F. BROWN,
*Notary Public.*

EXHIBIT A.

Sp. order 147, A. G. O., War Department, of March 27, 1865. Sec. 4. By direction of the President of the United States Captain Richard R. Corson, assistant quartermaster U. S. Volunteers, is hereby dismissed the service of the United States.

EXHIBIT B.

Sp. order 291: A. G. O., War Department, of June 9, 1865. Sec. 34. By direction of the President of the United States so much of special order No. 147, from this office, dated March 27, 1865, as dismisses Captain Richard R. Corson, assistant quartermaster of U. S. Volunteers, is hereby revoked, and he is hereby restored to his former position in the service.

Claimant's address, Norristown, Pa.

Attorney's address, 1412 Pa. av., Washington, D. C.

4 EXHIBIT C.

Sp. order 531, War Department, A. G. O., of October 7th, 1865. Sec. 29. Under the provisions of General Orders No. 79, May 1st, 1865, from this office, the services of the following-named assistant quartermasters of volunteers being no longer required, they are hereby honorably mustered out of service of the United States. They will receive no final payments until they shall have satisfied the Pay Department that they are not indebted to the United States.

* * * * * * *

Captain Richard R. Corson.

5 II.—*Traverse.*—*Filed Dec'r* 5, 1871.

And the said defendants, by their Attorney-General, come and make answer to the petition of the claimant herein; and not confessing the same, or any part thereof, deny each and every the allegations therein contained, and call for strict proof of the same.

And as to so much of the said petition as sets forth and avers that the said United States are indebted to the said claimant in the sum of five hundred and thirty-seven dollars and ninety-nine cents, the said defendants say that they are not indebted to the said claimant in the said sum of money, nor any part thereof.

And as to so much of the said petition as avers that the said claimant has at all times borne true faith and allegiance to the Government of the United States, and never voluntarily aided, abetted, or given encouragement to rebellion against the said Government, the said defendants deny the said allegation.

WILLIAM McMICHAEL,
*Assistant Attorney-General.*

6 III.—*Motion for leave to amend petition and allowance of same.*—*Filed & allowed May* 3, 1881.

And now comes the claimant in the above-entitled cause, by his attorney, H. W. Brelsford, and moves the court for leave to amend his petition in the amount of pay claimed to be due him as shown by the report of the Paymaster-General U. S. A., heretofore furnished the court in this cause, the amount therein appearing to be due being six hundred and sixty-eight dollars and thirty-nine cents ($668.39) instead of five hundred thirty-seven dollars and ninety-nine cents ($537.99), as set forth in claimant's original petition.

H. W. BRELSFORD,
*Attorney for Claimant.*

Allowed.

WM. A. RICHARDSON, *Judge.*

May 3, 1881.

7 IV.—*Findings of fact and conclusions of law thereon.*—*Filed.*

This case having been heard before the Court of Claims, the court, upon the evidence, finds the facts to be as follows:

I.

Claimant enlisted as a private soldier in the military service of the United States in August, 1861. Having been promoted from time to time, he was commissioned prior to March 27, 1865, as captain and assistant quartermaster of volunteers. From August, 1861, to March 27, 1865, his service was continuous. March 27, 1865, the following order was made

by President Lincoln, and notice served upon claimant within a few days thereafter:

[Special Orders No. 147.]

WAR DEPARTMENT, ADJUTANT-GENERAL'S OFFICE,
*Washington, March 27, 1865.*

* * * * * * *

4. By direction of the President, Captain Richard R. Corson, assistant quartermaster, U. S. Volunteers, is hereby dismissed the service of the United States.

* * * * * * *

By order of the Secretary of War:

E. D. TOWNSEND,
*Assistant Adjutant-General.*

II.

April 24, 1865, claimant made application to the President, through the Quartermaster-General, to have the order of dismissal revoked. Thereafter the following orders were successively issued by President Johnson:

[Special Orders No. 291.]

WAR DEPARTMENT, ADJUTANT-GENERAL'S OFFICE,
*Washington, June 9, 1865.*

* * * * * * *

34. By direction of the President so much of Special Orders No. 147, from this office, dated March 27, 1765, as dismisses Captain Richard R. Corson, assistant quartermaster, U. S. Volunteers, is revoked, and he is hereby restored to his former position in the service.

* * * * * * *

By order of the Secretary of War:

E. D. TOWNSEND,
*Assistant Adjutant-General.*

[Special Orders No. 315.]

WAR DEPARTMENT, ADJUTANT-GENERAL'S OFFICE,
*Washington, June 19, 1865.*

* * * * * * *

44. Captain Richard R. Corson, assistant quartermaster, U. S. Volunteers, is hereby assigned to duty as division quartermaster of the
8 1st Division, 1st Army Corps, with the temporary rank, pay, and emoluments of major of the Quartermaster's Department, under act of July 4, 1864.

* * * * * * *

By order of the Secretary of War:

E. D. TOWNSEND,
*Assistant Adjutant-General.*

III.

Under the orders set out in Finding II, claimant continued in the service from June 9, 1865, until mustered out by the following order:

[Special Orders No. 531.]

WAR DEPARTMENT, ADJUTANT-GENERAL'S OFFICE,
*Washington, October* 7, 1865.

* * * * * * *

29. Under the provisions of General Orders No. 79, May 1, 1865, from this office, the services of the following-named assistant quartermasters, U. S. Volunteers, being no longer needed, they are hereby honorably mustered out of the service of the United States. They will receive no final payments until they shall have satisfied the Pay Department that they are not indebted to the United States.

* * * * * * *

Captain Richard R. Corson.

* * * * * * *

By order of the Secretary of War:

E. D. TOWNSEND,
*Assistant Adjutant-General.*

IV.

Between the date of dismissal, March 27, 1865, and the date of revocation, June 9, 1865, it does not appear that the vacancy was filled by another appointment.

V.

The claim is for pay from March 27, 1865, to June 9, 1865, amounting to $328. Also for three months' pay proper, under the following statutes, amounting to $210:

[Act of 1865, March 3, ch. 81, § 4 (13 Stats., 497).]

SEC. 4. And be it further enacted, That all officers of volunteers now in commission below the rank of brigadier-general, who shall continue in the military service to the close of the war, shall be entitled to receive, upon being mustered out of the service, three months' pay proper.

[Act of 1866, July 16, ch. 181 (14 Stats., 94).]

An act to extend the benefits of section four of an act making appropriations for the support of the Army for the year ending June thirtieth, eighteen hundred and sixty-six, approved March third, eighteen hundred and sixty-five.

Be it enacted, &c., That section four of an act entitled "An act making appropriations for the support of the Army for the year ending June thirtieth, eighteen hundred and sixty-six," be so construed as to entitle to the

three months' pay proper, provided for therein, all officers of volunteers below the rank of brigadier-general who were in the service on the third day of March, eighteen hundred and sixty-five, and whose resignations were presented and accepted, or who were mustered out at their own request, or otherwise honorably discharged from the service after the ninth day of April, eighteen hundred and sixty-five.

VI.

Claimant was not indebted to the United States at the commencement of this suit.

9 CONCLUSIONS OF LAW.

Upon the foregoing findings of fact the court decides as conclusions of law that the claimant is entitled to recover the sum of $538.

V.—*Opinion of the court.*

SCOFIELD, J., delivered the opinion of the court:

In August, 1861, the claimant enlisted in the Union Army as a private soldier. After several intermediate promotions he was finally commissioned captain and assistant quartermaster. March 27, 1865, without hearing or notice he was dismissed by President Lincoln. June 9, 1865, the dismissal was revoked by President Johnson. Thereafter he continued in the service until October 7, 1865, when he was honorably mustered out.

The revocation, it is claimed, reinstated him in office as effectually as if the dismissal had never been made. Being thus reinstated he became entitled, as it is further claimed, to payment, both for the intervening time and the "three months' pay proper" allowed by the act of March 3, 1865, (13 Stat., 497.)

Upon the facts the claimant makes a strong appeal. As the dismissal appears to have been undeserved, the petition for reversal made without delay, and its prayer granted before the rights of other parties had intervened, it seems to present only a question of executive authority. Having the power to dismiss an officer or accept his resignation, it was supposed the President had power also to reconsider his action. Many, if not all, Presidents have claimed and exercised this power. Some have refused to consider stale cases, others have acted on cases of long standing. Some, following the uniform rule laid down by all Attorneys-General, have refused to review the decisions of their predecessors, others regarding the rule as one of convenience and propriety only, have taken up cases that had slept through several administrations. Many revocations have had no other effect than to right a wronged officer, others have not only disturbed the intervening rights of other officers, but drawn from the Treasury large amounts of unearned back pay. This power of revocation has frequently been recognized by the accounting officers of the Government, and in a qualified form by the early decisions of this court.

By some recent decisions of this court, affirmed upon appeal by the Supreme Court, the power to revoke a dismissal or withdraw an acceptance of a resignation has been very much circumscribed, if not wholly denied. (Mimmack's case, 10 C. Cls. R., 584, affirmed 97 U. S. R., 437; McElrath's case, 12 C. Cls. R., 201, affirmed 102 U. S. R., 426; Blake's case, 14 C. Cls. R., 462, affirmed 103 U. S. R., 227.) The purport of all these decisions is that the President having once dismissed a military officer or accepted his resignation and given notice thereof, so that nothing remained to be done to make the severance complete, cannot again restore him to office except by a new appointment in pursuance of a nomination to and confirmation by the Senate.

These decisions and the line of argument upon which they are based would authorize us to hold that the claimant, having been completely severed from the Army by the dismissal and notice, could only be restored by a new appointment, and that the revocation so far as designed to place him in statu quo was void. Whether it might operate as a new appointment is not a question in the case, because for all subsequent service he has already been paid.

10 But it is suggested that the cases above referred to could possibly have been decided upon facts and points not appearing in this. In the McElrath and Blake cases many years had intervened, and the places made vacant long before filled. In the Mimmack case the vacancy had been filled by Executive promotion, the Senate not being in session.

This case is not thus complicated. The revocation was in due form, no unreasonable time had elapsed, and the vacancy had not been filled. The only question to be decided is, had the President power to revoke the dismissal? Whatever our opinion may be, it is considered desirable, in fairness to the claimant, as well as for the information of the court and the executive departments, that a question so distinctly involving the power of the President, now, as often heretofore, claimed and exercised by that high officer, should be settled by the Supreme Court.

This can be accomplished only by deciding the case against the defendants.

The judgment of the court, therefore, is that the claimant recover from the defendants the sum of $538.

Nott, J., not being present at the hearing, took no part in the decision.

11 VI.—*Final judgment of the court.*

At a Court of Claims held in the city of Washington on the 22d day of May, A. D. 1882, the court, on due consideration of the premises, find for the claimant and do order, adjudge, and decree that the said Richard R. Corson do have and recover of and from the United States the sum of five hundred and thirtyeight dollars ($538.00).

12 VII.—*Application for an allowance of appeal.*

From the judgment rendered in the above-entitled cause on the 22d of May, 1882, in favor of claimant, the defendants, by their Attorney-General,

on the 14th day of August, 1882, make application for, and give notice of, an appeal to the Supreme Court of the United States.

WM. A. MAURY,
*Assistant Attorney-General.*

Filed August 14, 1882.

AT CHAMBERS.

Allowed.

C. D. DRAKE.
*Chief Justice.*

13 In the Court of Claims.

VIII.

RICHARD R. CORSON
*vs.*
THE UNITED STATES. } No. 6387.

I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, of the findings of fact by the court and the conclusion of law thereon, of the opinion of the court, of the final judgment of the court, of the application of defendants for allowance of appeal to the Supreme Court of the United States, and of the allowance of same by Chief-Justice Drake.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Washington, this fifteenth day of September, A. D. 1882.

[SEAL.] JOHN RANDOLPH,
*Ass't Clerk Court of Claims.*

(Indorsed on cover:) No. 266. The United States, appellant vs. Richard R. Corson. Court of Claims. Filed 15th September, 1882.

on the 14th day of August, 1882, make application for, and give notice of, an appeal to the Supreme Court of the United States.

WM. A. MAURY,
*Assistant Attorney-General.*

Filed August 14, 1882.

AT CHAMBERS.

Allowed.

C. D. DRAKE.
*Chief Justice.*

13 In the Court of Claims.

VIII.

RICHARD R. CORSON
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THE UNITED STATES. } No. 6387.

I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, of the findings of fact by the court and the conclusion of law thereon, of the opinion of the court, of the final judgment of the court, of the application of defendants for allowance of appeal to the Supreme Court of the United States, and of the allowance of same by Chief-Justice Drake.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Washington, this fifteenth day of September, A. D. 1882.

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# In the Supreme Court of the United States.

OCTOBER TERM, 1884.

THE UNITED STATES
*vs.*
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No. 266.

## BRIEF FOR THE UNITED STATES.

The record shows that upon the 27th of March, 1865, the claimant, then a captain in the volunteer service, was dismissed from such service by President Lincoln, by an order of which a few days afterwards he was duly notified; and that having filed a petition, upon the 24th of April, 1865, to have such dismissal revoked, that was granted by President Johnson upon the 9th of June, 1865, and the petitioner thereby in terms "restored to his former position in the service."

During the interval betwixt such dismissal and restoration the vacancy was not filled by another appointment.

An application subsequently for pay accruing during such vacancy, and also for "three months' pay proper" under an act of 1865 (given upon page 5 of the record), having been rejected by the Pay Department, this suit was

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During the interval betwixt such dismissal and restoration the vacancy was not filled by another appointment.

An application subsequently for pay accruing during such vacancy, and also for "three months' pay proper" under an act of 1865 (given upon page 5 of the record), having been rejected by the Pay Department, this suit was

brought to enforce the same. For reasons aside from the legal merits of the claim the learned court below considered it expedient to give judgment in favor of the claimant.

For error is assigned:

The above judgment, involving as it must an assumption that an order of dismissal from the Army may be effectively revoked after its execution; or, in other words, that the vacancy created by such dismissal may be filled otherwise than by formal *appointment*.

(1) Inasmuch as the removal in this case was made, and consequently the *vacancy happened*, during a recess of the Senate (which had adjourned sine die upon *the* 11*th* of March), the power of the President thereabouts was defined by clause 3, of Article II, section 2, of the Constitution: "The President shall have power to fill up all vacancies that may happen during a recess of the Senate by granting commissions which shall expire at the end of their next session." There is no suggestion of any issue of a commission here.

(2) The only question, therefore, is whether the removal had created a *vacancy;* for if it had, then the above was the only constitutional way of filling it.

But for the circumstance that learned counsel appear to have advised that it did not, it would have seemed that upon (*a*) principle, and (*b*) authority, there can be no doubt that it did.

(*a*) *Removal*, of course, operates *in invitum*. The consent, or acquiescence, or other state of will of the person removed, is immaterial. The only operative element

in the transaction is the will of the President. Whenever, at least in time of war (or, before the statute of 1866, ch. 176, sec. 5: 14 Stat., 92) the formal will of the President to that effect has been communicated to the person concerned, nothing else then occurring, such Executive act is ended. It becomes *factum*, and is no longer *ambulatory*, or *in the breast* of any one. The officer so acted upon becomes at once *a civilian*, with all the immunities and privileges of other civilians, no less and no more. Amongst other incidents he can procure office in the Army or elsewhere no otherwise than as they can.

There is nothing in course of Presidential action that *is analogous to terms* of courts; *i. e.*, no periods of time therein during which all acts are, in point of law, contemporary, so that such as transpire in earlier days thereof may be wholly set aside in its later days, under the doctrine of *relation*. The question, Whether *in fieri* or *factum?* must be decided upon the circumstances of *each separate act*, complex or simple. *Removal* being a simple act, independent even of any *appointment* which may follow, ordinarily there can be little difficulty in ascertaining it.

*Cases* of valid and irreversible dismissal from the service might well be *put*, attended with circumstances of greater nicety as regards the completion of the Executive act, than are now before the court. The action of President Lincoln herein was completed, and that, so far as is known or suggested, without any attendant doubt *upon his part* as to its propriety. All that devolved upon President Johnson, therefore, was power by constitutional methods to repair any possible mistake therein, by issuing to Cor-

son a new temporary commission to the *vacancy* which had *happened*, and then in due course consulting the Senate as to a reappointment.

(*b*) *Authority* upon this point is to the same purpose: Inasmuch as removal requires for efficiency but one will, it is of course equivalent to *resignation accepted*, where two wills concur. In Mimmack's case (97 U. S., 426) the question was whether, upon the 11th of December, 1868, the President could restore to military service an officer whose resignation had been accepted by himself upon the 29th of October before, some uncompleted attempts to fill the vacancy having been made in the mean time. Nothing in the opinion of this court turns upon these *attempts*. The court said (p. 437):

> "Officers of this kind are nominated by the President and confirmed by the Senate; and if the petitioner ceased to be such an officer when notified that his resignation had been accepted, it requires no argument to show that nothing could reinstate him in his office short of a new nomination and appointment.'

Inasmuch as *Palmer*, who had been "promoted" to Mimmack's *vacancy* on the 18th of November (during a *recess* of the Senate) was not *commissioned* thereto (p. 428) the *vacancy* had continued to exist until the 11th of December thereafter, the day upon which the President revoked the acceptance of the resignation. There was, therefore, in that case substantially the same circumstance as here, viz: *a change of the will* (*or wills*) *previously efficient in creating the vacancy, during a continuance of such vacancy in statu quo*. The only variations being that in

Mimmack's case the repentance occurred within a shorter period than here, and was attributable *to the same President* who had given effect to the act supposed to be repented of. So far as either of these circumstances is material it makes the principles of that decision applicable *a fortiori* to the present case.

In McElrath's case (102 U. S., 426), it is held that an appointment by the President and Senate to an office otherwise full—from which, however, the President *alone* might have *removed*—is in effect such *sole* act of *removal* as well as a *joint* act of *appointment*. And in Blake's case (103 U. S. 227), where the President had no *sole* right to remove, the above view is extended and an appointment by the President and Senate held to be in effect a *joint removal* as well as *appointment*. The decision in Blake's case is repeated in *Keyes's*, 109 U. S. 336.

In each of these cases a difficulty had been made whether certain prior official action had had the effect of creating a *vacancy*, the fact of vacancy being supposed to depend upon such action. This court however avoided that difficulty by the view just stated. No one of the cases suggests that a removal which has been followed by an appointment is more an accomplished fact than one not so followed. The question in each was as to the *evidence*, and not as to the *nature* or *effect* of a certain act. It is argued, *not* that an appointment operates a removal, but *per contra*, that inasmuch as no appointment can be effective without a subsisting vacancy (created at least during the preceding instant), therefore an appointment creates presumptive *proof* of a removal, *omnia rite acta*, &c., where removal is necessary to vacancy. These cases con-